APPEAL NO. 93121

This appeal arises under the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. art. 8308-1.01 *et seq*. (Vernon Supp. 1993) (1989 Act). On January 8, 1993, a contested case hearing (CCH) was held in (city), Texas, with (hearing officer) presiding as hearing officer. The sole issue at the hearing was "[d]id claimant suffer a compensable injury in the course and scope of his employment?" The hearing officer determined that the respondent, claimant herein, sustained a compensable injury (myocardial infarction) in the course and scope of his employment on (date of injury). Appellant, carrier herein, contends that the hearing officer misapplied the facts and the law, and misunderstood the argument presented at the hearing, and requests that we reverse the hearing officer's decision and render a decision in its favor. Claimant failed to file a response.

DECISION

The decision of the hearing officer is reversed and rendered as incorrectly applying the provisions of Article 8308-4.15.

The facts in this case are not much in dispute. Claimant, in April of 1992, was a 61-year-old certified public accountant (CPA) with a long history of severe coronary artery disease. In 1981 a quintuple aorta coronary bypass operation was performed on claimant. Claimant was placed on medication (aspirin, Persantine and Lanoxin) and did "relatively well." In February 1985, claimant had an episode of what might have been a cerebrovasal spasm. Also in 1985, claimant had an episode of chest pain "suggestive of coronary insufficiency." Since 1987 claimant has had "some occasional atypical chest pain, but no classic symptoms of angina." Claimant's medical history states that multiple stress tests have been negative to a good exercise tolerance level. The hearing officer's statement of the evidence fairly and accurately summarizes the evidence presented leading up to the incident in question and is adopted for purposes of this decision.

Claimant states because of his heart condition he has tried not to work on weekends. Nevertheless, in order to get some old client files ready for pickup, he went to the office for a couple of hours on Saturday, April 18th, and on Sunday, April 19th. On each day, claimant states, he lifted or moved about 15 or 20 boxes full of files which he estimated weighed up to 65 pounds when full. Claimant states he does not normally lift or move heavy boxes in the course of his business. On Sunday, April 19, 1992, while moving boxes in the office, claimant testified he became nauseous, began sweating and had a swelling or tightness in his neck. Claimant stated he went home around 10:30 a.m. and rested for the remainder of the day. The next morning, Monday, April 20th, as was his custom, claimant stated he took a brisk walk at approximately 7:00 a.m. Upon returning home, claimant states, he called his office to speak with one of his employees when he began experiencing severe chest pain. Claimant testified he told his employee he thought he was having a heart attack, called to his wife who called an ambulance, and claimant was taken to the hospital. Claimant states, and the medical records support, that he suffered a myocardial infarction. After an unsuccessful angioplasty, claimant underwent a quadruple aorta

coronary artery bypass.

The doctors involved were (Dr. F), a cardiologist, (Dr. K), a cardiovascular surgeon, and (Dr. C), a cardiologist. Dr. K was the surgeon who did both the 1981 and the 1992 coronary artery bypass procedures. Dr. K does not express an opinion on the cause of claimant's myocardial infarction, although on commenting on the 1981 bypass procedure Dr. K states ". . . there remained a defect in the old LAD graft. Due to the severity of his disease, it was recommended [claimant] undergo a repeat bypass surgery. Please see copy of diagram." The referenced diagram illustrates severe and sometimes 100 percent arterial occlusions. It is evident from the diagram that claimant has a long history of severe heart disease.

Dr. F, although apparently not the claimant's primary care physician, is the treating cardiologist. Dr. F, in a report dated October 8, 1992, opines:

> It is my opinion that [claimant] probably had a coronary event, such as a ruptured plaque, on the day that he was performing the heavy exertion but it did not culminate in an immediate myocardial infarction. However, early on the day following the exertion, he did evolve and sustain an anterior wall myocardial infarction. It would seem, from the temporare (sic) relationship that the two are probably related and, as you know, physical stress is a risk factor for heart attacks and sudden cardiac death and there is an increase incidence of heart attack incidents during and following strenous (sic) exercise.

Claimant was also seen by Dr. C, a cardiologist apparently selected by the carrier. Dr. C, by letter report dated November 9, 1992, commented on Dr. F's theory:

> It was [Dr. F]'s impression that the patient had a coronary event with a ruptured plaque on the day that he was performing heavy exertion, and that this eventually evolved into an acute myocardial infarction two days later. Although this is certainly a possibility, and it is well known that exertion can lead to myocardial infarction, it is impossible for me to say that this infarction occurred as a result of the heavy labor especially in view of the fact that this labor occurred two days prior to admission for this infarction.
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> Although it is possible that the plaque that [Dr. F] describes may have caused the infarction, it is equally possible, in my opinion, that the infarction occurred as a result of natural progression of known severe coronary artery disease dating back to 1981. I cannot unequivocally state that this infarction was the result of this man's heavy exertion.

In summary, it is impossible to maintain with any reasonable medical certainty that this man's infarction was the result of his physical exertion, especially in view of the fact he had severe coronary disease that probably progressed from 1981, and in view of the fact that the patient's infarction was two days after his heavy labor. It is a possibility that the exertion is causally related, however this is not medically possible to prove.

We note, as the claimant points out in his closing argument, that Dr. C is slightly mistaken in stating the myocardial infarction occurred two days after claimant exerted himself. The uncontradicted testimony was that the myocardial infarction was less than 24 hours after the work-related exertion.

The applicable findings and conclusions of the hearing officer were:

FINDINGS OF FACT

5.While engaged in the heavy lifting on April 19, 1992, CLAIMANT began to sweat, feel nauseous, have diarrhea, and experience tightness and swelling in his neck.

6.CLAIMANT discontinued his activity because of his discomfort, which included slight chest pain, and returned to his home where, although he rested the remainder of the day, CLAIMANT continued to feel poorly.

7.On Monday, (date of injury), CLAIMANT, although still not feeing well, went for a walk as is his custom each day.

8.Upon returning from his walk, CLAIMANT began to experience severe chest pain and was taken to the hospital, where it was determined that he had suffered a myocardial infarction.

9.CLAIMANT'S myocardial infarction of (date of injury), was the result of the physical exertion he experienced at work the day before and was not caused by the natural progression of his preexisting heart condition or disease.

CONCLUSIONS OF LAW

2.CLAIMANT suffered a compensable injury in the course and scope of his employment.

The pertinent portion of the 1989 Act is Article 8308-4.15 (section 4.15) which provides:

A heart attack is a compensable injury under this Act only if:

(1)the attack can be identified as:

(A)occurring at a definite time and place; and

(B) caused by a specific event occurring in the course and scope of employment;

(2)the preponderance of the medical evidence regarding the attack indicates that the employee's work rather than the natural progression of a preexisting heart condition or disease was a substantial contributing factor of the attack; and

(3)the attack was not triggered solely by emotional or mental stress factors, unless it was precipitated by a sudden stimulus.

Carrier attacks the hearing officer's decision on the basis that claimant asserted that he lifted boxes the day before his heart attack only after learning that he had workers' compensation coverage, and that Dr. F "was able to change his opinion based on the new history given by [claimant]." We note these allegations go to the weight and credibility to be given to the evidence and that the hearing officer is the sole judge of the weight and credibility to be given to the evidence. *See* Article 8308-6.34(e); Texas Workers' Compensation Commission Appeal No. 92232, decided July 20, 1992.

Of greater concern is carrier's contention that claimant's heart attack is not a compensable injury as set forth in section 4.15. That claimant had a preexisting heart condition, in and of itself, will not preclude a finding of a compensable injury. A preexisting condition such as diseased arteries will not preclude compensation. Mueller v. Charter Oak Fire Ins. Co., 533 S.W.2d 123 (Tex. Civ. App.-Tyler 1976, writ ref'd n.r.e.). However, since preexisting heart disease is usually present in heart attack cases, it is critical that the job-related exertion "was a substantial contributing factor of the attack." Section 4.15(2). Neither Dr. F nor Dr. C use the language of the Act in giving an opinion whether claimant's exertion moving boxes on the morning of Sunday, April 19th, rather than the natural progression of claimant's preexisting heart condition or disease, was a substantial contributing factor of the attack. Dr. F merely says ". . . the two are probably related. . . ." Dr. C states ". . . it is equally possible . .. that the infarction occurred as a natural progression of known severe coronary artery disease. . . ." Neither doctor balances or weighs the claimant's work-related physical exertion the day before claimant's attack against the possibility that claimant's heart attack was caused by the natural progression of claimant's preexisting heart condition or disease. In fact, neither doctor even mentions claimant's brisk walk immediately preceding the attack as a possible cause or precipitating factor for

claimant's heart attack.

The hearing officer cites Texas Workers' Compensation Commission Appeal No. 92052, decided March 30, 1992, for the proposition that because a medical expert fails to use, or improperly uses, "magic words" that the substance of his testimony should not be ignored. We do not disagree with that proposition. Conversely, we note that use of "magic words" or phrases from a statute do not mean a fact finder, or for that matter a reviewer, can ignore the substance of the testimony.

The hearing officer then equates Dr. F's statement that "probably related" equates to "reasonable medical probability." Even if this were accurate, it does not resolve the issue of whether claimant's exertion some 21 hours before his heart attack "was a substantial contributing factor." The claimant has the burden of proving by a preponderance of the evidence that he sustained a compensable injury. Johnson v. Employers Reinsurance Corporation, 351 S.W.2d 936, 939 (Tex. Civ. App.-Texarkana 1961, no writ). This burden would require proof by a preponderance of the medical evidence that the exertion of lifting boxes the day before his heart attack, rather than the natural progression of his preexisting heart condition, was a substantial contributing factor of the attack. We have on more than one occasion held that this provision of the statute requires a comparison or weighing between the conditions leading to the heart attack. Texas Workers' Compensation Commission Appeal No. 91009, decided September 4, 1991, and Texas Workers' Compensation Commission Appeal No. 92115, decided May 4, 1992. It is not enough, as we view the legislative language, to show by some evidence that some work-related exertion was "probably related" to the attack. "The preponderance of the medical evidence regarding the attack must indicate that the work rather than the natural progression of a preexisting heart condition or disease was a substantial contributing factor of the attack." Appeal No. 92115, *supra*. By its very terms, section 4.15 requires this weighing or comparison. *See* Texas Workers' Compensation Commission Appeal No. 91046, decided December 2, 1991 (which was cited by the hearing officer in her discussion). The term "rather than," it is suggested in 1 Montford, Barber, Duncan, A Guide to Texas Workers' Comp Reform, Sec 4A15, page 4-78 (1991), can be read as "as opposed to." In a footnote on page 4-78, it is stated that "[t]his requirement places the burden of proof on the claimant to establish within reasonable medical probability that the work was a substantial contributing factor as opposed to a preexisting heart condition." (Emphasis supplied.) Appeal No. 92115, *supra*. Dr. F's comment that the work-related exertion on April 19th was "probably related" to claimant's myocardial infarction some 20 plus hours later does not meet the burden of proof required of claimant (nor do we find in the hearing officer's decision that the balancing provision of section 4-15(2) was properly applied). The statement that the exertion and the heart attack were "probably related" would at best be a statement that the exertion was a contributing factor of the attack. This distinction is particularly important where there was considerable evidence of a severe underlying heart condition or disease which had already required a quintuple coronary bypass procedure.

In several cases we have discussed the new and more demanding standards for the compensability of heart attacks under the 1989 Act, and we noted the case law developed under prior legislation. Appeal No. 91009, *supra*; Appeal No. 92115, *supra*; Texas Workers' Compensation Commission Appeal No. 92355, decided August 28, 1992. Not only does the 1989 Act require medical evidence to the level of preponderance, but it must indicate that the employee's work rather than the progression of preexisting heart disease was a substantial contributing factor of the attack (section 4.15(2)). In Appeal No. 91009 we said the medical evidence must be compared or weighed as to the effect of the work and the natural progression of a preexisting heart condition.

Although the hearing officer, in Finding of Fact No. 9, quoted above, recites that claimant's heart attack was the result of exertion and not caused by the natural progression of claimant's heart condition, the hearing officer fails to compare or weigh the medical evidence to show that the exertion "was a substantial contributing factor" of the attack as opposed to the natural progression of claimant's preexisting heart condition. Even if one could infer a balancing in Finding of Fact No. 9, there is no medical evidence to support the proposition that the heart attack was not caused by the natural progression of claimant's heart condition. In fact, Dr. C states that it is equally possible that claimant's infarction occurred as a natural progression of claimant's known severe heart disease. As noted previously, mere recitation of "magic words" does not constitute fact or evidence. The hearing officer discusses Dr. F's report and compares it to Dr. C's opinion, but the evidence fails to show that the exertion was at best anything more than a contributing factor. Also, as noted previously, the hearing officer equates "probably related" as to measuring reasonable medical probability. Even so, Dr. F is only saying with "reasonable medical probability" that claimant's exertion the day before was related to claimant's heart attack. This falls short of the statutorily imposed higher standard of a substantial contributing factor and fails to rule out that the heart attack was caused by the natural progression of claimant's known severe heart disease.

We have on several occasions addressed the question of the compensability of heart attacks under the 1989 Act. In Texas Workers' Compensation Commission Appeal No. 92673, decided January 28, 1993, the claimant sustained work related angina pectoris (which the hearing officer questionably defined as a heart attack), claimant was hospitalized and subsequently a triple coronary bypass procedure was performed after catherization disclosed lesions in three coronary arteries. In a split decision, we affirmed the hearing officer who found the angina pectoris compensable but the disability due to the triple bypass operation noncompensable. In Texas Workers' Compensation Commission Appeal No. 92034, decided March 19, 1992, we affirmed a finding that a heart attack was not compensable when the medical evidence failed to link claimant's heart attack to his work as a substantial contributing factor rather than the natural progression of his preexisting heart condition or disease. In Texas Workers' Compensation Commission Appeal No. 92170,

decided June 17, 1992, decedent stopped work, grabbed his chest, and went to the hospital immediately after assisting in lifting a heavy tire. We affirmed the hearing officer in finding the heart attack not compensable because the medical evidence regarding the attack failed to show that the employee's work rather than the natural progression of a preexisting heart condition or disease was a substantial contributing factor of the attack. The doctor in that case stated the decedent's work activity "could have" contributed to the heart attack.

In our opinion, the present case is similar to Appeal No. 91009, *supra*; Texas Workers' Compensation Commission Appeal No. 91031, decided October 24, 1991; Texas Workers' Compensation Commission Appeal No. 91044, decided November 14, 1991; Texas Workers' Compensation Commission Appeal No. 91061, decided December 9, 1991; and Texas Workers' Compensation Commission Appeal No. 91063, decided December 5, 1991, in that in those cases there was either no medical evidence offered by the claimant relating the cause of the heart attack to his work or the medical evidence offered by the claimant, at most, indicated that his work was a contributing cause of the heart attack. Appeal No. 92052, *supra*. We find in this case that Dr. F's comment that claimant's probable "coronary event" caused by the exertion was "probably related" to the myocardial infarction and that "physical stress is a risk factor for heart attacks" (emphasis added) amounts to no more than saying the exertion was probably a contributing factor, and this falls short of the statutorily imposed higher standard of a substantial contributing factor. The job-related exertion, to be a substantial contributing factor permitting recovery, must be weighed and compared with the preexisting condition and outweigh that preexisting condition as the cause of the heart attack. This is a two step procedure which requires medical evidence to show the work-related exertion was a substantial contributing factor (rather than merely a contributing factor) and that the substantial contributing factor was not outweighed by the natural progression of claimant's preexisting condition. Dr. F's comments, as previously noted, can at best be considered as establishing the work-related exertion as only a contributing factor and omits any reference at all to the natural progression of claimant's preexisting condition. Failure to make the comparison, or merely reciting the comparison in the absence of any medical evidence, is as a matter of law, a fatal failure to adhere to the requirements of the 1989 Act.

Finding that the medical evidence regarding claimant's heart attack is insufficient to support a finding that claimant's physical exertion at work rather than the natural progression of claimant's preexisting heart condition or disease was a substantial contributing factor of claimant's myocardial infarction, the decision is reversed and a new decision is rendered that claimant's myocardial infarction of (date of injury) was not a compensable injury sustained in the course and scope of his employment. Claimant is not entitled to workers' compensation benefits.

Thomas A. Knapp
Appeals Judge

CONCUR:

Stark O. Sanders, Jr.
Chief Appeals Judge

Philip F. O'Neill
Appeals Judge